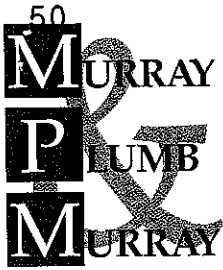


Peter Benard: Permit #L-25260-L3-A-N & #L-25260-TC-B-N
// Mckearney Village Sub-division

- Licensee reply to the Dr. Dowd's appeal of the Chair's August 12th ruling to dismiss the appeal



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October 13, 2011

Susan M. Lessard, Chair
Board of Environmental Protection
c/o Terry Dawson
#17 State house Station
Augusta, Maine 04333-0017

RE: Mary Dowd Appeal of DEP Permits L-25260-L3-A-B and L-25260-TC-B-N Issued to Peter Benard for McKearney Village, Yarmouth

Dear Chair Lessard:

This office represents Peter Benard, the licensee under the above-described permits (hereafter the "Permits") for the McKearney Village Subdivision (hereafter the "Project"). On behalf of Mr. Benard, I am writing to request that the full Board affirm your decision, dated August 12, 2011 dismissing Dr. Mary Dowd's appeal for lack of standing (hereafter the "Decision").

A. The Contents of Dr. Dowd's Appeals

By correspondence dated July 29, 2011, Dr. Dowd filed a written notice of appeal from the Commissioner's decision to grant the Permits (hereafter "Appeal I"). In Appeal I, Dr. Dowd alleged that the Commissioner and DEP Staff had given insufficient weight to evidence, submitted by Dr. Dowd and others, that the Project would have an adverse effect on wetlands. However, Dr. Dowd did not indicate how, if at all, she personally would be harmed by the Project.

As you noted in your Decision, Chapter 2 of the DEP regulations requires that any notice of appeal include "evidence demonstrating the appellant's standing as an aggrieved person." 06-096 C.M.R. ch. 2, § 24(B)(2). Because Dr. Dowd failed to produce such evidence, you properly dismissed Appeal I for lack of standing. *See*, 06-096 C.M.R. ch. 2, § (24)(B)(1).

Section 24(B)(1) provides that: "The Chair's ruling to dismiss an appeal for lack of standing as an aggrieved person is appealable to the full Board." Dr. Dowd apparently filed such an appeal by letter dated September 8, 2011 (hereafter "Appeal II"). In Appeal II, Dr. Dowd concedes that she is not an abutter to the Project site. Moreover, she repeatedly notes that whatever injury she may suffer as a result of the project is shared by many other Yarmouth residents:

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The majority of Yarmouth residents living in the many neighborhoods affected by the project, can be considered aggrieved for several reasons. ...If this development goes through and the soils built on cannot absorb the water displaced from the wetlands, my properties and the properties of all the other residents downstream from the site will have to. ...I, and many of my neighbors downstream from this project, are indeed personally aggrieved. ...As a physician and resident of Yarmouth, I am obviously aggrieved by the large scale pollution of our river and bay and aggrieved not just for my own sake, but for the lasting detrimental effect it will have on my children's lives and future generations in Yarmouth....I would ask the DEP to take a second look at this development because it is one that will have serious long-term consequences for the entire town of Yarmouth. ...

Dr. Dowd alleges that she would be personally harmed by the Project in only the following manner:

With heavy rains or snowmelt, water from this stream already runs through my back yard. With a major disturbance of the wetlands I anticipate major drainage problems on my property and water in my basement.

However, Dr. Dowd does not explain how storm water discharged from the Project would reach her property, how her situation differs from that of any of the other persons who own property "downstream" of the Project site, or even how she knows that water that is *already* flowing through her property originates at the Project site.

B. Dr. Dowd Lacks Standing to File Appeals I and II

1. Dr. Dowd's alleged injury is not distinct from the harm potentially suffered by the public at large.

The Maine Supreme Judicial Court has long held that a person lacks standing to appeal from a development approval unless that person can prove that she will suffer "particularized injury" as a result of the approval. "A particularized injury occurs when a judgment or order adversely and directly affects a party's property, pecuniary, or personal rights. ... A person suffers a particularized injury only when that person suffers injury or harm that is 'in fact distinct from the harm experienced by the public at large.'" *Nergaard v. Town of Westport Island*, 2009 ME 56, ¶18, 973 A.2d 735, 740 (internal citations omitted). In *Nergaard*, the Court ruled that individuals whose property did not abut the project site, did not live in the immediate vicinity, and would be disturbed by traffic from the project any more than other persons in the community, lacked standing to appeal from a Planning Board's approval of the project.

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The same is true here. Dr. Dowd evidently believes that the construction of house lots and supporting infrastructure on the Project site will interfere with wetland functions, particularly in the area of what she terms a “stream.” However, she concedes that she is not an abutter; that “many neighborhoods” are affected by the Project; and that if the development increases the rate of runoff from the Project site, it will adversely impact not only her but “all the other residents downstream from the site” and “the entire Town of Yarmouth.”

It is understandable that individuals who are interested in environmental issues would wish to express their concerns to regulatory bodies that are reviewing development projects. Indeed, it is laudable that altruistic people seek to preserve the environment for the sake of the common good. However, no matter how noble her concerns may be, unless a person can demonstrate that a licensing decision threatens her with harm that is distinct from that potentially suffered by the general public, she lacks standing to appeal from the decision.

In Appeals I and II, Dr. Dowd does not allege that she will suffer unique injury from the Project. To the contrary, she emphasizes that whatever harm may befall her will also be visited upon her neighbors and the residents of the Town in general. Accordingly, Dr. Dowd lacks standing to file Appeals I or II.

2. Dr. Dowd will suffer no particularized injury from the Project

a. Dr. Dowd has not affirmatively proved that she will suffer a particularized injury

The only harm that Dr. Dowd “anticipates” may happen to her as a result of the Project is “major drainage problems on my property and water in my basement.” For several reasons, however, Dr. Dowd’s “anticipation” is insufficient to grant her standing to file Appeals I and II.

First, water already runs from the “stream” into her property during “heavy rains and snowmelt.” Dr. Dowd does not reveal how she knows that there is a “stream” located on the applicant’s private property. Assuming that there is indeed a stream located near the northeast corner of the project site, Dr. Dowd does not reveal how she has been able to identify that stream as the sole, or even a contributing, source of the water that allegedly runs through her back yard. Dr. Dowd identifies herself as a physician; she does not claim to have expertise or training in the fields of storm water engineering, wetland biology, or soils hydrology. As the record stands now, there is no basis on which the DEP or this Board could conclude that the “stream,” if it exists, either presently discharges surface water onto Dr. Dowd’s property or will when the Project is built out.

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Of course, one would not necessarily need to be an expert to see that a stream is flowing onto a directly abutting property. However, Dr. Dowd is not an abutter to the Project. Her property (Lot 41-124) is located on the opposite side of Hillside Street from the Project, approximately 1,600' from the nearest portion of the Project site. 1,600' exceeds the length of five football fields.

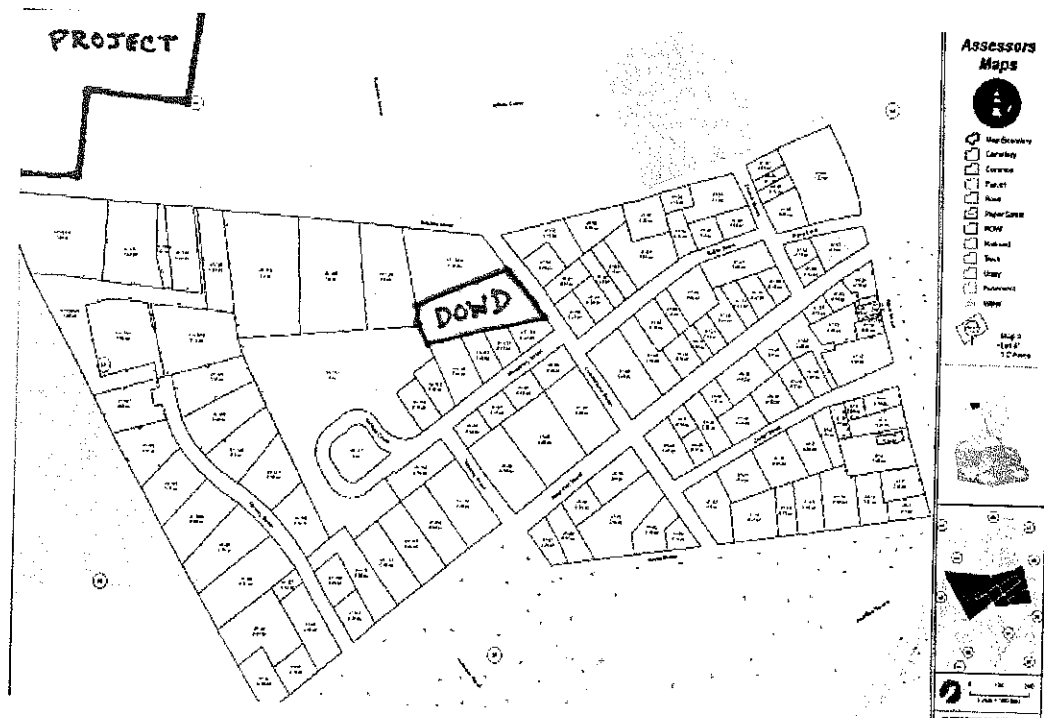


Figure 1
Tax Map Excerpt

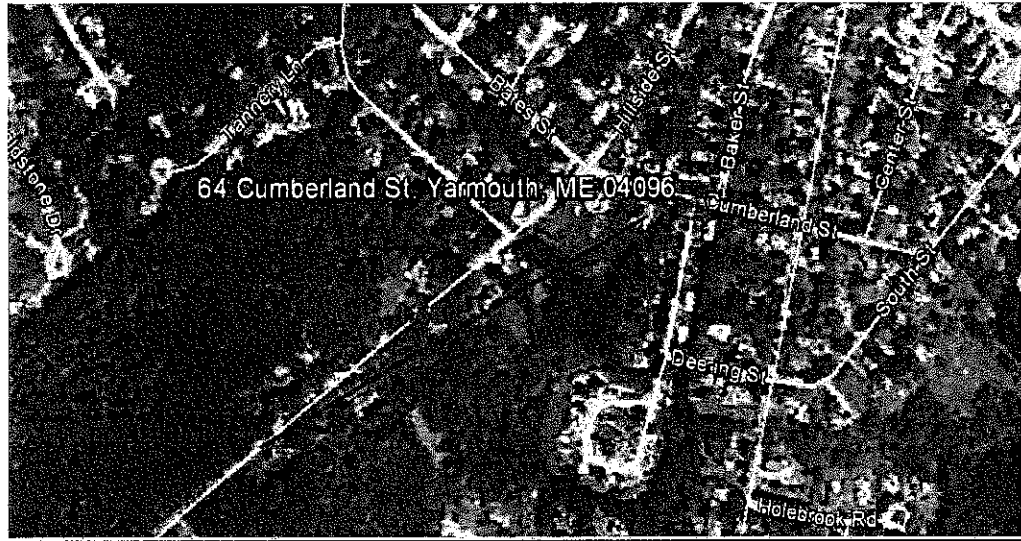


Figure 2
Google Earth Image

As is shown in Figures 1 and 2, in addition to Hillside Street, there are several wooded lots between Dr. Dowd's property and the nearest portion of Project. Dr. Dowd has presented no competent evidence that water from the northeast corner of the Project site makes its way into Dr. Dowd's back yard.

True, Dr. Dowd submitted with Appeal I a report, dated November 25, 2005, by Lauren Stockwell of "Stockwell Environmental Consulting." Because the report contains no resume or curriculum vitae for Ms. Stockwell, her qualifications for preparing that report are not of record. Moreover, in a footnote to her undated letter to Lisa Vickers of the DEP, Dr. Dowd instructs Ms. Vickers to "ignore the parts of the Stockwell report that refer to the flagging and boundaries as *these apply to the earlier development, not this one.*" (emphasis added) Because the Stockwell report does not concern the Project, it is irrelevant to the Appeals.¹

¹ In any event, although Ms. Stockwell reports various observations from a site walk of what may or may not be the same site as the Project, she does no more than identify the regulatory approvals the applicant must obtain and recommend that certain natural features be examined more closely. She does not go so far as to predict that even the 2005 Project will adversely affect neighboring properties.

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b. The applicant has shown that Dr. Dowd can suffer no injury from the project

In the following series of figures, the applicant will demonstrate that Dr. Dowd will suffer no injury from the construction of the Project:

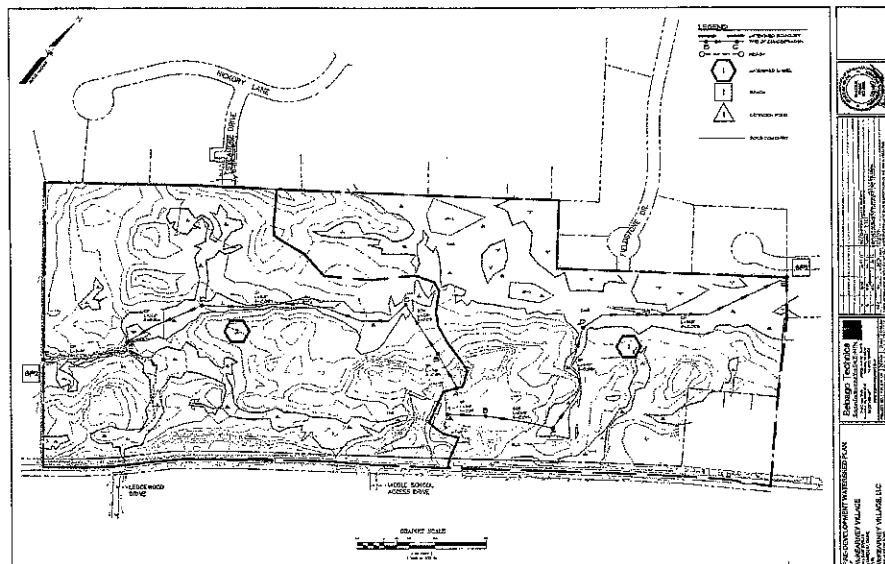


Figure 3
Pre-Development Watershed Plan dated May 11, 2011

The serpentine line running roughly through the middle of the Project site represents the watershed divide within the Project site. Areas to the right of the line drain towards the Royal River; areas to the left of the line drain toward the Piscataqua River.

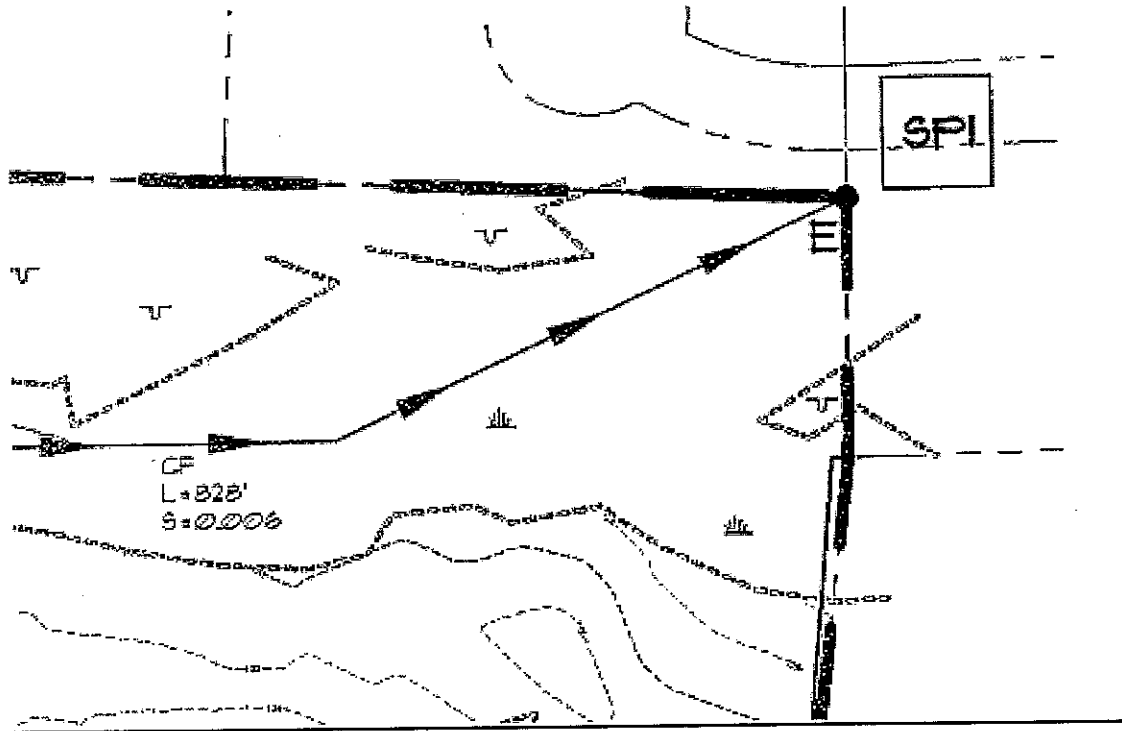


Figure 4
Detail of Northeast Corner of Project from Pre-Development Watershed Plan
From Figure 3 Above

Figure 4 depicts the northeasterly corner of the Project site. It should be noted that the direction of storm water flow (the line with arrows) as it leaves the site is toward the north – away from Dr. Dowd’s property. This figure also shows “SP1” an abbreviation for “Study Point 1.” That is one of the points for which the applicant calculated the pre-development and post-development storm water flows from the Project.

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PEAK RATE SUMMARY TABLE						
STUDY POINT	2-YEAR STORM		10-YEAR STORM		25-YEAR STORM	
	PRE	POST	PRE	POST	PRE	POST
SP1	6.28	6.02	10.51	19.42	28.71	26.86
SP2	14.56	9.63	38.48	38.38	51.14	41.66

Figure 5
 Pre- and Post-Development Peak Run-Off Rates
 From Figure 6 Below

As is evident from the chart shown as Figure 5, the post-development run-off rates at SP1 (shown in Figure 4 above) are calculated to be *less* than the pre-development run-off rates during the 2-year, 10-year, and 25-year storms. Accordingly, if we assume that Dr. Dowd is correct and that the “stream” that exits the property at SP1 causes water to flow into her back yard, construction of the Project will *lessen* the rate of runoff water into her property.

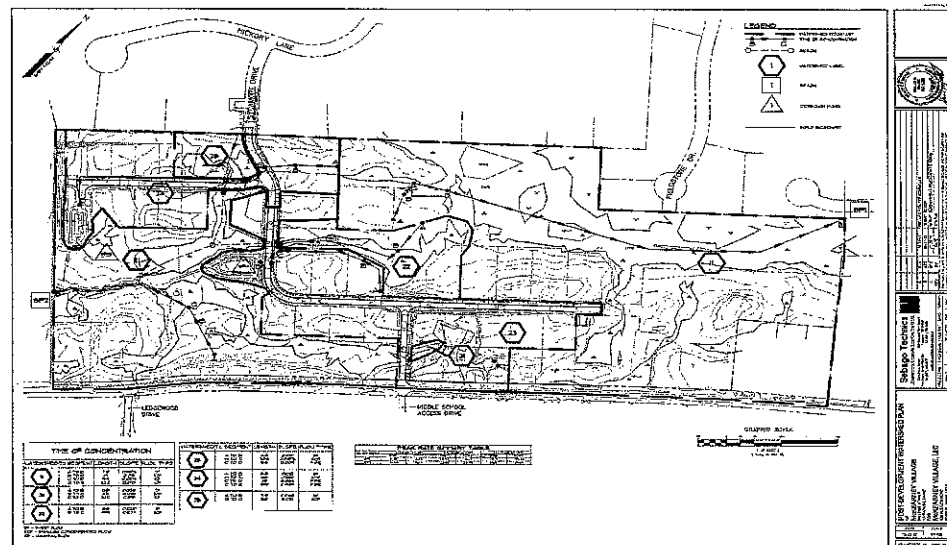
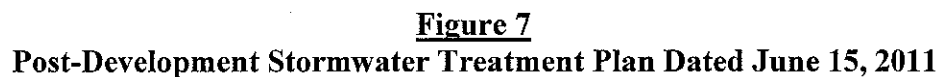


Figure 6
 Post-Development Watershed Plan Dated May 11, 2011

As developed, the boundary between the Royal River and Piscataqua River watersheds is shifted significantly to the east, thereby decreasing the area of the project site that drains toward Dr. Dowd’s property. In addition, the channel that drains toward the Royal River has been moved away from Hillside Street and closer to the northwesterly boundary of the property.



C. Conclusion

First, the only harm that Dr. Dowd anticipates from the Project will be, according to her, shared by the general public. It is not unique or particular to her. Accordingly, even if Dr. Dowd had proved that she would be injured by the Project, her injury is not sufficiently “particularized” to grant her standing to file Appeals I or II.

Second, Dr. Dowd failed to provide credible evidence that the Project will, in fact, injure her at all. According to her, Dr. Dowd has already been “injured;” she claims (without substantiation) that stormwater already flows from the Project site into her back yard. If such is the case, then the only way the Project could harm her further would be if it increased the rate of stormwater flow into her yard. However, as was demonstrated above, completion of the Project will *reduce* the rate at which stormwater exits the Project site. Moreover, portions of the site that once were in the

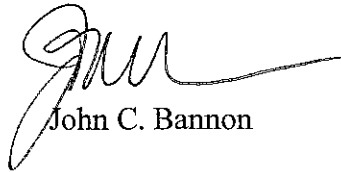
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watershed of the Royal River will be in the watershed of the Piscataqua River, thereby reducing the volume of stormwater that flows in the direction of Dr. Dowd's property.

For the foregoing reasons, on behalf of licensee Peter Benard, I respectfully request that the Board affirm the Chair's ruling of August 12, 2011, and rule that Dr. Dowd lacks standing to assert either Appeal I or Appeal II.

Thank you for your attention to this letter.

Sincerely,

A handwritten signature in black ink, appearing to read "JCB", with a long horizontal flourish extending to the right.

John C. Bannon

JCB/ljs

Cc: Service List

